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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-323

FRED ARTHUR LANE, III and
WILLIAM KENT JONES,

Petitioners/Defendants,

vs.

UNITED STATES OF AMERICA,

Appellee/Plaintiff.

PETITION FOR WRIT OF CERTIORARI

TO THE TENTH CIRCUIT COURT OF APPEALS

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This is a Petition for FRED ARTHUR LANE, III and WILLIAM KENT JONES for a Writ of Certiorari to review the Order made by the United States Court of Appeals for the Tenth Circuit on April 6, 1978, refusing to reverse MESSRS. LANE and JONES conviction for possess-

and dispensing cocaine in violation of Title 21 U.S.C. §§841(a)(1) and 18 U.S.C. §2. The United States Court of Appeals for the Tenth Circuit ruled that the classification of cocaine as a Schedule II narcotic drug under 21 U.S.C. §812(c), Schedule II (a)(4), is arbitrary and rational. Specifically, the Court relied on United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973) cert. den. 415 U.S. 915.

OPINIONS BELOW

To the Petitioner's knowledge there are no official or unofficial reports of the Order of the District Court refusing to grant FRED ARTHUR LANE, III and WILLIAM KENT JONES' Motion for Dismissal of the Indictment. This motion attacked the classification of cocaine as a narcotic as unconstitutional. The official opinion of the United States Court of Appeals for the Tenth Circuit

affirming Petitioners' convictions is reported at 574 F.2d 1019(1978). (A copy of said Opinion is attached to Appendix A hereto).

JURISDICTION

1. On March 10, 1976, the Federal Grand Jury for the District of Colorado returned a One-Count Indictment against Petitioners LANE and JONES charging them with violations of 21 U.S.C. §841(a)(1) and Title 18, U.S.C. §2.

2. On April 30, 1976, a hearing was held before the Honorable Richard P. Matsch, United States District Judge, for a disposition of Petitioner's Motions to Suppress Evidence, to Sever, and for Dismissal of the Indictment filed March 10, 1976. The Motion to Dismiss was denied. On May 24, 1976, trial commenced to a jury. On May 25, 1976, Petitioners were found guilty as charged.

On June 25, 1976, a timely Notice of Appeal was filed.

3. On April 6, 1978, the United State Court of Appeals for the Tenth Circuit affirmed LANE and JONES'convictions and on May 30, 1978, LANE and JONES' Petition for Rehearing was denied by said court.

4. On June 15, 1978, the United States Court of Appeals for the Tenth Circuit granted defendants' Motion for Stay of Mandate until July 8, 1978.

5. On July 31, 1978, the Stay of Mandate was continued until August 25, 1978.

6. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is cocaine a non-narcotic for medical and pharmacological purposes.

2. May cocaine be classified as a narcotic for penalty purposes.

3. Does the inclusion and reference to cocaine as a narcotic during the prosecution stage of the proceeding violate petitioners' constitutional right to equal protection of the laws, procedural due process, fundamental fairness and right to trial by an impartial jury as guaranteed by article III, and the Fifth and Sixth Amendments to the United States Constitution.

4. Is 21 U.S.C. §841(a)(1) unconstitutional as applied to petitioners.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article III of the United States Constitution.

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and

establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2, Clause 1.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, -to all Cases affecting Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more

States;-between a State and Citizens of another State;-between citizens of different States,-between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens therof, and foreign States, Citizens or Subjects.

Section 2, Clause 2.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Pary, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as as the Congress shall make.

2. Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without such compensation.

3. Sixth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

4. Title 21 U.S.C. §812

5. Title 21 U.S.C. §841

The foregoing statutes have been set forth in the Appendix attached hereto.

STATEMENT OF THE FACTS

1. On February 24, 1976, a discussion took place between defendant FRED ARTHUR LANE, III, and an undercover agent in which Lane suggested that he and defendant, WILLIAM KENT JONES, had a cocaine deal they thought the agent would be interested in. Lane suggested that the agent discuss the details with Jones, and Jones subsequently handled the negotiations on price and amount.

2. On February 26, 1976, Jones told the agent over the phone that he and Lane would deliver the drug in Denver by placing it in a van parked at the Denver airport. After the agent delivered the purchase money to Jones, the agent was directed to the van and inside found a paper bag containing white powder. Lane appeared at that time and asked the agent if he had found the bag and if it looked

alright.

3. Both Lane and Jones were arrested at the scene after the agent performed a chemical test on the powder in the bag which indicated the presence of cocaine.

REASONS WHY WRIT SHOULD BE GRANTED

The classification of cocaine as a Schedule II "narcotic" controlled substance along with the other addicting opiates has been challenged in the federal courts numerous times in recent years. There exists now a split in the decisions of the Tenth Circuit, United States v. Smaldone, 484 F.2d 311, (1973) and the Ninth Circuit, United States v. Harper, 530 F.2d 828 (1976).

The reason for this split is that the latest scientific research has demonstrated that cocaine, from a medical

and a pharmocological standpoint, should not be classified with other Schedule II narcotics. Its chemicals properties more closely resemble the amphetamines listed on Schedule III. It is non-addictive; its effect is to stimulate the central nervous system and to create a mild sense of euphoria. In contrast, the true narcotic drugs listed on Schedule II stemming from the opiate family act as a depressant upon the central nervous system, they are generally addictive, running rapidly to tolerance, and causing severe physical withdrawal symptoms upon termination.

Nevertheless, courts are cautious when a legislative determination such as this is constitutionally challenged. The factual underpinnings of such a classification are scientific and sociological and the legislature is more likely

than not the governmental body capable of making an accurate determination.

Some courts still defer entirely to the legislative determination that cocaine is a narcotic for medical and legal purposes, that is, they have refused all together to consider the constitutional challenges made against the classification. United States v. Smaldone, supra; United v. Lane, supra.

On the other hand, a significant number of courts have now recognized that cocaine for medical and pharmacological purposes is not a narcotic. However, they have also held that cocaine may be considered a narcotic for penalty purposes, concluding that there may be a rational basis for the government's determination that a conviction for possession with intent to distribute cocaine deserves a harsher sentence.

This conflict in the federal courts, in fact, raises a substantial constitutional question. If cocaine is to be considered a narcotic only for penalty purposes, it would seem that during the prosecution stage it would be highly prejudicial to the defendant to refer to it as a narcotic substance. The rational bases suggested by those courts who now classify cocaine as a narcotic for penalty purposes alone, are among others, that the drug is associated with the environment of organized crime and is used in close association with heroin.

Referring to cocaine as a narcotic at the trial stage necessarily invokes this criminal environment. At least, it suggests to the juror a more serious offense. The defendant, of course, is entitled at this point to be in the presence of an impartial jury which knows

without the slightest ambiguity exactly what he is charged with.

The Tenth Circuit has refused to consider the challenges to the constitutionality of the classification of cocaine and has not reached the conclusion that it should be classified as a narcotic only for penalty purposes. Thus, at the prosecution stage of the proceeding cocaine may be repeatedly referred to as a narcotic without the significant recognition of its true character made in other jurisdictions such as the Ninth Circuit.

The federal courts in their holdings have rendered the term "narcotic" prejudicially ambiguous. It is necessary that this Court give the word precise definition so that those who sit in judgment will be aware of the true nature of the offense. In other words, can cocaine, a non-narcotic stimulant, be referred to

as a narcotic at the prosecution stage of the proceedings or does this reference deny the petitioners the right to equal protection of the law, procedural due process, fundamental fairness, and the right to trial by an impartial jury.

ARGUMENT

A.

COCAINE IS MEDICALLY AND PHARMACOLOGICALLY NOT A NARCOTIC BUT MAY BE CLASSIFIED AS ONE FOR PENALTY PURPOSES

In the recent decision of United States v. Castro, 401 F. Supp. 120 (N.D. Ill. 1975) the United States District Court for the Northern District of Illinois decided that cocaine had been arbitrarily classified as a narcotic for pharmacological and medical purposes under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §841. The court found

significant differences between cocaine and other drugs classified as a narcotic. The court also found, as many authorities have long contended, that cocaine is not addictive. The court specifically stated:

> Even though the available body of knowledge will not permit us to draw conclusion as to the impact of cocaine on a person's health, it is clear that the effects are vastly different from those generally associated with true narcotics. Based on the foregoing, it is clear, from a medical standpoint, that Congress has erroneously classified cocaine with heroin and other opiates for penalty purposes. (emphasis added)

While other federal district courts have not been as emphatic in their pro-

nouncement of cocaine as a non-narcotic for medical purposes,this proposition has been widely accepted. United States v. Miller, 387 F. Supp. 1097 (D. Conn. 1975). (no indication that Congress intended its statutory definition of a narcotic to coincide with the pharmacological definition); United States v. Hobbs, 392 F. Supp. 444 (D. Mass. 1975) (government does not challenge defendants' argument that cocaine is a stimulant and not a narcotic); United States v. Brookins, 383 F. Supp. 1212 (D.N.J. 1974) (government admits that cocaine is not a narcotic); United States v. Amidzich, 396 F. Supp. 1140 (E.D. Wis. 1975) (court will presume for sake of argument that cocaine is not a narcotic); United States v. Dilaura, 394 F. Supp. 444 (D. Mass. 1974) (the statutory definition of cocaine is broader than the pharmacological defin-

ition). The Ninth Circuit Court of Appeals in United States v. Ronald Lee Harper, 530 F.2d 828 (9th Cir. 1978) cited the above cases with approval. If this writ is accepted, numerous authorities in support of the position that cocaine is not a narcotic, will be presented in the brief.

Once cocaine had been either presumed or established as a non-narcotic for medical purposes, these courts went on to ask "whether Congress can rationally classify cocaine, a non-narcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes. In other words, must the legal or congressional classification of cocaine as a narcotic mirror its medical classification?" United States v. Brookins, 383 F. Supp. at 1214. Without exception the courts agreed that Congress could classify cocaine as a narcotic

for penalty purposes.

In making this determination, the courts insisted that the minimum scrutiny of the rational basis test was all that was required in review of this statutory classification. Thus, in speculating on Congress' rationale for classifying cocaine with other narcotic drugs, a variety of possibilities were suggested. These will be reviewed in part B of the argument. It is submitted that the judicial classification of cocaine as a narcotic solely for penalty purposes requires that it be presented during the prosecution stage of the proceeding as a Schedule II controlled substance. This is a necessary result of the court's determination that cocaine is a narcotic solely for penalty purposes.

This result did not occur in the

Tenth Circuit. In United States v. Lane, 579 F. 2d 1019 (10th Cir. 1978), the court essentially ignored the constitutional challenge to the classification of cocaine as a narcotic relying on its earlier decision in United States v. Smaldone, 484 F. 2d 311 (10th Cir. 1973).

However, Smaldone had also refused to consider the issue of the constitutionality of the classification of cocaine as a narcotic relying in turn on Padilla v. U.S., 278 F.2d 188 (5th Cir. 1960), and Erwing v. U.S., 323 F.2d 674 (9th Cir. 1963). The issue in both Padilla and Erwing, was not whether the classification of cocaine as a narcotic was constitutional, but whether cocaine, not specifically mentioned in the Schedule II list of narcotic drugs, was, nevertheless, incorporated as a derivative of coca leaves. The courts found in each instance that it was.

Because the Tenth Circuit Court of Appeals has refused to seriously consider the constitutionality of the classification of cocaine as a narcotic either during the prosecution stage or at the penalty stage, it remains a narcotic in both the legal and medical sense of the word. Thus, during the prosecution stage of the proceeding against petitioners which included the indictment, trial, and jury instructions, it was repeatedly referred to as a narcotic. In the indictment read to the jury, the language "did knowingly and intentionally distribute a quantity of cocaine, a Schedule II narcotic controlled substance" was used. (Original Record, Vol. 3, 395). The court instructed the jury "that cocaine is a Schedule II narcotic controlled substance as a matter of law." The testimony of a chemist at the trial was that cocaine was a narcotic. (Original Record,

Vol. 1, p. 6.). Since the jury does not determine the penalty for the crime, it is submitted that a serious conflict arises as to the treatment of the classification of cocaine as a narcotic at the prosecution stage. The issue which arises is whether cocaine,a non-narcotic, may be treated as a narcotic at the prosecution stage or only at the penalty stage of both.

B.

THE INCLUSION AND REFERENCE TO COCAINE AS A NARCOTIC DURING THE PROSECUTION STAGE OF THE PROCEEDING VIOLATED PETITIONERS' CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS, PROCEDURAL DUE PROCESS, FUNDAMENTAL FAIRNESS AND THE RIGHT TO TRIAL BY AN IMPARTIAL JURY AS GUARANTEED BY ARTICLE III AND THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As indicated in Part A of the argument, cocaine has been determined

a narcotic solely for penalty purposes. Numerous federal courts concluded that recent scientific research no longer justifies the classification of cocaine as a narcotic for medical and pharmacological purposes.

These courts have been forced to take judicial notice of the pharmacological and medical nature of cocaine because of the persistent constitutional attack against its classification as a Schedule II narcotic. They have, however, refused to rule the statutory classification of cocaine as a Schedule II narcotic unconstitutional since no fundamental interest is jeopardized. Even if cocaine is classified as a Schedule III controlled substance, they argue, defendant will still be subject to loss of liberty. Since there is no fundamental right to a less severe penalty, the courts

have uniformly applied the minimum scrutiny rational basis test as set forth in United States v. Carolene Products Co., 304 U.S. 144, (1938). This test requires facts to be shown which would preclude the assumption that a statute rests upon some rational basis within the knowledge and experience of the legislators, an almost impossible burden to meet.

In applying this test the court need not look for the actual reasons Congress acted as it did. The court may in fact, randomly speculate and if any basis at all can be rationally asserted the statutes will be upheld.

Courts which found cocaine to be legitimately classified as a narcotic for penalty purposes have asserted a variety of rational bases for such classification. In U.S. v. Brookins,

supra, the court repeated the government's assertion that Congress was aware of the discrepancy between the legal and pharmacological classification of cocaine at the time of the hearings immediately proceeding the Comprehensive Drug Abuse Prevention and Control Act of 1970, but retained the narcotic classification of cocaine for penalty purposes because of "its established capacity as a dangerous drug, (and) its long association with heroin in the illicit market." 383 F. Supp. at 1216. In U.S. v. Hobbs, supra, the court stated that:

> Congress may have concluded that since the price of cocaine on the illicit drug market is extremely high, it is more likely to attract major drug traffickers or provide a source of revenue for organized crime.

> Congress may have concluded that a high-profit enterprise must also be treated as a high-risk enterprise in order to effectively deter criminal activity in this market. 392 F.Supp. at 447.

Other reasons have been set forth as plausible, e.g. the classification may be in furtherance of treaty obligations. In any event, as a matter of law, cocaine may be properly classified as a narcotic for penalty purposes.

Needless to say, these reasons for the continued classification of cocaine as a narcotic for penalty purposes are all conjectural; though probably the most plausible reasons suggested are cocaine's potential for abuse, its use in association with heroin and in particular its association with organized crime. For

some or all of these reasons many federal courts have concluded that cocaine may be classified as a narcotic for penalty purposes but not for pharmacological or medical purposes.

The courts have arguably created these two classifications for a reason. Since cocaine may be a narcotic for penalty purposes and the jury does not assess the penalty, it is constitutionally untenable to introduce these assumptions about cocaine being a narcotic at the prosecution stage of a criminal proceeding. Only at the penalty stage do these assumptions have a place in sustaining the validity of the statute.

Cocaine is medically and pharmacologically not a narcotic. How can there possibly be any justification for referring to it as a narcotic at the prosecution stage, which stage included

the indictment, trial and jury instructions in a proceeding. The word, itself, as demonstrated by those courts searching for a rational basis for its classification as a narcotic at the penalty stage, suggests organized crime, addiction and the potential for abuse found in the "true" narcotics. Such reference at the prosecution state can only create a prejudice, and a bias in the minds of the jury as to the nature of the drug and the offense itself.

By introducing the term narcotic at the prosecution stage an unreasonable burden is then placed on petitioners to show that the substance is a non-narcotic. Further, the term narcotic can only inflame or impassion the minds of the jury as to the seriousness of the offense committed. It is well established that heroin abuse is one

of the nation's most serious social and law enforcement problems. If cocaine is a narcotic for penalty purposes and the jury has nothing to do with determining the penalty, the use of the term narcotic in the indictment, during the trial and in the instructions given to the jury should be impermissible. Cocaine should rather be referred to only as a Schedule II controlled substance.

This is where the conflict arises between the Ninth and Tenth Circuits. The Ninth Circuit (Harper) states that the classification of cocaine as a narcotic for penalty purposes is rational while the Tenth Circuit (Smaldone, Lane) make no distinction as to the treatment of cocaine at either the prosecution or penalty stage.

To refer to cocaine as a narcotic rather than a Schedule II controlled

substance during the prosecution stage creates a misconception in the minds of the jury. This creates a misinformed, uneducated and ill-advised public; the very public that sits in judgment of defendants facing cocaine related charges. The law should have a real interest in fact-finding; in arriving at conclusions supported by current evidence. Since cocaine is a non-narcotic medically and pharmocologically, it cannot be referred to as a narcotic during the prosecution stage without denying petitioners procedural due process of law, equal protection, fundamental fairness and the right to a trial by an impartial jury.

In Lane, the petitioners were indicted for possession with intent to distribute cocaine, a Schedule II "narcotic" controlled substance. Repeated references were made during the trial by

the chemist, prosecutor and the judge during the instructions to the fact that cocaine was a narcotic. We submit that these actions in light of recent federal decisions made 28 U.S.C. §841(a)(1) unconstitutional as applied.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the accused. The law never imposes upon the accused in a criminal case, the burden or duty of calling any witnesses or producing any evidence. This is fundamental to the notion of due process of law in a criminal proceeding.

Nevertheless, once cocaine is referred to as a narcotic during the prosecution stage of the proceeding, the defendant has the burden of proving it is a non-narcotic for medical and pharmacological purposes. Narcotics are serious business in the eyes of a jury; a

defendant cannot afford to let that presumption of the nature of his offense go on the record unchallenged. Since a jury is instructed that cocaine is a narcotic, the burden on the defendant becomes even greater.

Furthermore, as shown by the federal court decisions classifying cocaine as a narcotic for penalty purposes, there are other presumptions which must be answered. Generally these presumptions accentuate the seriousness of the offense. What arose in the minds of the courts justifying the classification of cocaine as a narcotic would likely arise in the minds of jurors, i.e., its association with heroin and organized crime. This would result in trial by a biased and uninformed jury.

Of course, it would be difficult, if not impossible to advance any theory as

to the effect such association may have on the jurors' minds. But that is not the point. The defendant is entitled to an impartial jury and that is one which is fair, honest, truth seeking, and without bias or prejudice.

The decisions of the federal court have created ambiguity in the term "narcotic" as applied to cocaine. Since cocaine is a narcotic only for penalty purposes, equal protection of the law mandates that at the prosecution stage of the proceeding cocaine not be classified or referred to with the "true narcotics" listed on Schedule II.

It is hoped that the court will not deny this petition. Fundamental rights are at issue; the right to procedural due process and equal protection of the laws, and the right to fundamentally fair treatment from an im-

partial jury. It is respectfully requested that the court review these constitutional violations of petitioners' right with the exacting scrutiny they deserve.

CONCLUSION

By referring to cocaine, a non-narcotic stimulant as a narcotic during the prosecution stage of the proceedings would require a finding that 28 U.S.C. 841(a)(1) is unconstitutional as applied in this case.

Respectfully submitted,

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APPENDIX A

U.S. v. Lang, 574 Fed. 2d 1019

(Not Reproduced)

APPENDIX B

§812. Schedules of controlled substances- Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

. . . .

(2) SCHEDULE II.-

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United

States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

. . . .

SCHEDULE II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative,

or preparation therof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgoinin.

§841. Prohibited acts A - Unlawful acts

(a) Except as authorized by this

sub-chapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distrubute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in Schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one

or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(b) In the case of a controlled substance in Schedule I or II which is

not a narcotic drug or in the case of any controlled substance in Schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter of subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such

term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

Supreme Court, U. S.
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October Term, 1978

No. 78-323

FRED ARTHUR LANE, III and
WILLIAM KENT JONES,

Petitioners,

vs.

UNITED STATES OF AMERICA.

SUPPLEMENTAL APPENDIX

TO PETITIONERS

WRIT OF CERTIORARI

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UNITED STATES of America,

Plaintiff-Appellee,

vs.

Fred Arthur LANE, III and William Kent Jones, Defendants-Appellants.

Nos. 76-1717 and 76-1718.

United States Court of Appeals,
Tenth Circuit.

Argued and Submitted Sept. 30, 1977.

Decided April 6, 1978.

Rehearing Denied May 30, 1978.

Defendants were convicted in the United States District Court for the District of Colorado, Richard P. Matsch, J., of distribution of cocaine, and they appealed. The Court of Appeals, Lewis, Circuit Judge, held that: (1) evidence was sufficient to sustain conviction despite fact that testimony of undercover agent was largely uncorroborated; (2) there was no error in

denial of mistrial on basis of comment of prosecutor tending to associate testimony of government witness with the United States attorney's office; (3) where defendant put on no evidence at trial substantiating claim of entrapment, there was no showing that he was prejudiced by failure of government informant to appear and testify on theory that he would have aided in establishing such a defense, and (4) where undercover agent's notes concerning his activities were not written contemporaneously but were written hours, even days, later, it would be judicial invasion into proper law enforcement to require preservation of such notes, and defendants were not entitled to reversal of conviction on ground that such notes had been destroyed after formal report had been prepared.

Affirmed.

Before SETH, Chief Judge, and LEWIS, Circuit Judge, and BRIMMER, District Judge.

LEWIS, Circuit Judge.

Defendants appeal from a judgment of the district court entered on a jury verdict of guilty in a prosecution for distribution of cocaine. 21 U.S.C. §841(a)(1). On appeal defendants claim numerous errors, some claims being made jointly and some individually. We begin by addressing defendant Lane's claim that the evidence was insufficient to prove his guilt beyond a reasonable doubt.

(1) Viewing the evidence in a light most favorable to the government, as we must, the undercover agent's testimony established that his first discussion with Lane about this transaction was on February 24, 1976. On that date Lane suggested he and defendant Jones had a cocaine deal they

thought the agent would be interested in. Lane suggested that the agent discuss the details with Jones and Jones subsequently handled the negotiations on price and amount. Lane's next involvement was on February 26 when Jones told the agent over the phone that he and Lane would deliver the drug in Denver by placing it in a van parked at the Denver Airport. After the agent delivered the purchase money to Jones, the agent was directed to the van and inside found a paper bag containing white powder. Lane appeared at that time and asked the agent if he had found the bag and if it looked alright. Both Lane and Jones were arrested at the scene after the agent performed a chemical test on the powder in the bag which indicated the presence of cocaine.

We believe the above evidence was sufficient to find defendant Lane guilty beyond a reasonable doubt of distributing cocaine. Under the statutory definition, "distrubute" means "actual, constructive, or attempted transfer." 21 U.S.C. §§802(11), 802 (8). The testimony of the government agent established Lane's participation in the transfer of cocaine. The fact that the testimony was largely uncorroborated is not significant in this context because we have previously held that the testimony of an undercover agent alone is sufficient to convict under 21 U.S.C. §841(a)(1). See United States v. Martin, 10 Cir., 526 F.2d 485, 486.

(2) The second issue requiring our consideration is one raised by both defendants. Error is claimed in

comments made by the prosecutor in closing argument.[1] Defendants argue the government attorney attempted to bolster the credibility of his principal witness by giving his personal

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1. The comments principally complained of were as follows:

> Mr. Snow: Mr. Ware would have you believe that this is a battle of credibility. That the only thing we stand on is Agent Knapp.
>
> It is not the only thing we stand on. We stand, also, on Agent Fagan as well as Mr. Buybal.
>
> Mr. Ware would have you believe that this man (Agent Knapp) has plotted with malice to concoct a story, lied upon the stand under oath, simply to better his record. We would submit to you that it requires more than one person in our system to concoct, because it is this man's testimony; Mr. Fagan's testimony; and Yes, the United States Attorney's office is their bedfellow, also.
>
> Mr. Ware: Your Honor, I am going to ask that that remark be stricken. It is highly improper.
>
> The Court: That remark is inappropriate.

opinion of the agent's trustworthiness and by associating the testimony with the U.S. Attorney's office. Defendant Jones moved for a mistrial based on the comments but the motion was denied. We believe the district court was correct.

Although we have in the past ordered a new trial on the basis of prosecutorial misconduct, the cases in which it has occurred exhibit substantially more serious misconduct than occurred here. See, e.g., United States v. Ludwig, 10 Cir., 508 F.2d 140. Indeed, from a reading of the record we find the statement which defendants claim is most objectionable (see note 1 supra) somewhat ambiguous. Under these circumstances, accompanied by the fact that a cautionary instruction was given negativing any improper inference the jury might have drawn, we do not believe reversible error

exists.

(3) In a third allegation of error, defendant Jones argues he was prejudiced in his defense by the failure of a government informant to appear and testify. Jones argues the informant would have aided in establishing an entrapment defense. The district court denied a continuance when the informant failed to appear on the grounds that defendant had not shown a reasonable likelihood of establishing entrapment. On a motion for new trial after the verdict the informant did appear but claimed the fifth amendment privilege as to all questions. The district court denied the motion for new trial, again deciding that no evidence of entrapment was alleged and, because the fifth amendment would have been asserted at trial, the failure of the informant to appear had not prejudiced

defendant. We think the first ground of denial is sufficient for us to affirm the district court's judgment.

In this court's latest decision on entrapment we made clear that in order for the defense to be valid the criminal activity must have been the "creative activity" of a government agent. United States v. Swets, 10 Cir., 563 F.2d 989. "/T/he fact that a Government agent affords an opportunity for the commission of an offense and otherwise engages in artifice and stratagem does not constitute entrapment." Id. at 990. The only basis for entrapment that defendant Jones asserted as to this transaction was that the informant had introduced him to Agent Knapp, who was posing as a drug dealer. Jones put on no evidence at trial substantiating his claim of entrapment. The

district court was clearly correct in denying the motion for a new trial.

(4) Defendant Lane also asserts he was prejudiced in his defense by the destruction of certain investigation notes kept by Agent Knapp. This contention was in no way presented to the trial court and reaches us only through a supplement to appellant's brief. Appellant's burden to show clear error is accordingly a heavy one.

At the time Agent Knapp destroyed the subject notes it was common practice for DEA agents to do so after a formal report had been prepared. Such destuction was neither required nor prohibited by an official agency regulation or policy. The practice, as such, has recently been severely criticized by both the Ninth and D.C. Circuits.

See United States v. Harris, 9 Cir., 543 F.2d 1247; United States v. Harrison, 173 U.S. App.D.C. 260, 524 F.2d 421. However, the cited cases each consider the practice only as it pertains to agent's notes taken contemporaneously with an interrogation. The agent's notes in such regard are intended to reflect only the informed accused's or a witness' statement. It is obvious that any deviation from the notes appearing in the official report of the statement may furnish an aid to an accused. Such is not our case. The subject notes concerned the undercover agent's activities. The notes are not written contemporaneously but hours, even days, later. The very existence of such notes constitutes a real hazard to the undercover agent. Interrogation notes are intended to be factual only. Notes

of undercover activity may well contain impressionary matter involving diverse persons. We think it would be a judicial invasion into proper law enforcement to require the preservation of such notes and are convinced that to reverse this case as appellant urges at this late date would thwart justice. See generally United States v. Smaldone, 10 Cir., 484 F.2d 311, 311-18, cert. denied, 415 U.S. 915, 94 S.Ct. 1411, 39 L.Ed.2d 469.

(5,6) Defendants raise several other issues which require only brief treatment. Lane contends the statute classifying cocaine as a schedule II narcotic (21 U.S.C. §812) is unconstitutional because there isno rational basis for the classification. Lane presents scientific evidence to support his argument that cocaine is not a narcotic.

We have previously considered this precise question in United States v. Smaldone, supra, at 319-20. Defendant's argument was rejected in that case with reasons given. No further discussion is required here. This same response can be given to defendants' argument that the Jury Selection Plan for the District of Colorado fails to comply with 28 U.S.C. §1861 because, with most grand and petit juries serving in Denver, persons in western and southern Colorado are largely excluded from service. Reference to our opinion in United States v. Test, 10 Cir., 550 F.2d 577, 581 n.4 and 594, shows that this argument was considered and rejected. No reason is advanced for reconsideration of that holding. Finally, Lane argues the government failed to comply with Fed. R. Crim.P.

16 by refusing to produce an airline ticket allegedly obtained from him when he was arrested. Teh government denies any such ticket ever existed. No motion for new trial was made on this ground and we perceive no reversible error. Having considered all of defendants' issues on appeal, the judgment is

Affirmed.